

N. TAS Continues to Monitor the IRS's Implementation of the Supreme Court Decision in *Windsor* and Processing of Same-Sex Marriage Returns and Related Claims

On June 26, 2013, in *United States v. Windsor*, the Supreme Court held unconstitutional section 3 of the Defense of Marriage Act of 1996 (DOMA) which effectively had precluded federal recognition of same-sex marriage.¹ Subsequently, the IRS issued Revenue Ruling 2013-17, effective as of September 16, 2013, to implement this decision.² The Revenue Ruling adopted a general rule recognizing a marriage of same-sex individuals that were lawfully married under state law for all federal tax purposes including income, estate and gift, and employment taxes. Analysis of the latest census data indicates that over a million individual taxpayers may be affected by the IRS's implementation of the *Windsor* decision and may face return filing or processing difficulties.³

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While the decision and guidance resolve fundamental issues, various questions about the tax status of unmarried domestic or civil union partners persist.⁴ Additionally, as various state laws on same-sex marriage, civil unions, and registered domestic partnerships evolve, some same-sex couples may remain uncertain as to whether they are married for state and federal tax purposes.⁵

In its response to the recommendations contained in the National Taxpayer Advocate 2013 Annual Report to Congress, the IRS committed to continue issuing formal and informal guidance as issues arise.⁶ However, the IRS has been slow to address various issues about the tax status of unmarried domestic or civil union partners. The IRS's web site seems to conflate civil unions with registered domestic partnerships and does not address distinctions by jurisdiction.⁷ One-size-fits-all guidance to registered domestic partners and individuals in civil unions of various jurisdictions may exacerbate confusion and provide ambiguous or misleading advice to taxpayers.⁸ The Q&As became further outdated on June 30, 2014, when thousands of registered domestic partners were deemed married under the laws of the state

¹ *U.S. v. Windsor*, 133 S. Ct. 2675 (2013). See also 1 U.S.C. § 7, Pub. L. No. 104-199, 110 Stat. 2419.

² Rev. Rul. 2013-17, 2013-38 I.R.B. 201.

³ National Taxpayer Advocate 2013 Annual Report to Congress 258.

⁴ *Id.* at 256-63 (Most Serious Problem: *Defense of Marriage Act: IRS, Domestic Partners and Same-Sex Couples Need Additional Guidance*).

⁵ For example, Washington State passed a law automatically converting certain state registered domestic partnerships into marriages as of June 30, 2014. See Wash. Rev. Code § 26.60.100 (2012).

⁶ See IRS responses to the 2013 Annual Report to Congress recommendations, available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/IRS-2013-MSP-Responses.pdf>. See also U.S. Department of the Treasury, IRS Office of Chief Counsel 2013-2014 Priority Guidance Plan, available at <http://www.irs.gov/uac/Priority-Guidance-Plan>.

⁷ IRS, Answers to Frequently Asked Questions for Registered Domestic Partners and Individuals in Civil Unions, available at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Registered-Domestic-Partners-and-Individuals-in-Civil-Unions> (last revised September 19, 2013).

⁸ See National Taxpayer Advocate 2013 Annual Report to Congress 260 (where the IRS advised that opposite-sex Illinois civil union couples could file married jointly).

of Washington, blurring the seemingly easy distinction between marriage on one hand, and registered domestic partnerships and civil unions on the other.⁹

The IRS should carefully analyze the attributes of formal relationships that are not marriages under state law and tailor its advice to the needs of taxpayers in various jurisdictions. As the law in domestic and foreign jurisdictions continues to evolve, the IRS should work closely with TAS and all affected stakeholders.

The Impact of Federal Recognition of Same-Sex Marriage on Filing of Original and Amended Returns

The IRS guidance implementing *Windsor* explained that it would recognize a valid marriage of same-sex individuals for all federal tax purposes, including income, gift and estate, and employment taxes, regardless of whether a couple resides in a jurisdiction that recognizes same-sex marriage or in a jurisdiction that does not recognize the validity of same-sex marriages.¹⁰ The IRS also announced that:

- For taxable year 2013 and going forward, same-sex spouses generally must file using a married filing separately or jointly filing status.
- Similarly, for tax year 2012 and all prior years, same-sex spouses who file an original tax return on or after September 16, 2013, generally must file using a married filing separately or jointly filing status.
- For tax year 2012, same-sex spouses who filed their tax return before September 16, 2013, may choose, but are not required, to amend their federal tax returns to file using married filing separately or jointly filing status.¹¹
- For tax years 2011 and earlier, same-sex spouses who filed their tax returns timely may choose, but are not required, to amend their federal tax returns to file using married filing separately or jointly filing status.¹² However, in order to get a refund, generally, the taxpayer must file a claim for refund three years from the date the return was filed or two years from the date the tax was paid, whichever is later.¹³

Additionally, after *Windsor*, if the period of limitations for filing a claim for refund is open, employers may seek refunds of Social Security and Medicare taxes paid to the extent of

9 See Wash. Rev. Code § 26.60.100 (2012). See also Washington Secretary of State, Notice regarding same sex marriage and domestic partnerships, available at <https://www.sos.wa.gov/corps/domesticpartnerships/Notice-regarding-same-sex-marriage-and-domestic-partnerships.aspx> (last visited on June 30, 2014).

10 Rev. Rul. 2013-17, 2013-38 I.R.B. 201. See also IRS, *Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, available at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples> (last visited Mar. 26, 2014).

11 All items that must be reported on the return or claim and are affected by the marital status of the taxpayer must be adjusted to be consistent with the marital status reported on the amended return or claim.

12 However, if a same-sex spouse chooses to amend a return for a reason unrelated to marital status, for example to claim an increase in mortgage interest, he or she is not required to change the filing status claimed on the original return.

13 IRC § 6511.

employer-provided health coverage to the employee's same-sex spouse and dependents should have been excluded, and employees may amend returns to reduce gross income.¹⁴

Delayed Protective Claims and the Potential for Processing Errors

As described above, same-sex spouses who would have owed less tax but for DOMA may amend returns for open years. The period for amending returns may have been extended with respect to those taxpayers who filed "protective" claims in anticipation of the Supreme Court decision.

From July 24 to August 29, 2013, IRS instructions told employees to hold amended returns that referenced DOMA or *Windsor*.¹⁵ Consequently, the IRS suspended hundreds of these "protective" claims in Field Exam, Employment Tax, Accounts Management, and Campuses.¹⁶ W&I has reported closing all DOMA protective claims handled by the Accounts Management function after the formal guidance was released. SB/SE campus, excise tax, and estate and gift tax functions generally do not track cases involving DOMA claims, so there is no data available. Some data, however, is available from other functions.¹⁷

Of the 287 DOMA claims opened in SB/SE Field Exam, to date only 68 have been closed, with 219 claims remaining open as of May 23, 2014.¹⁸ The majority of the remaining claims have been pending for over 300 days.¹⁹ For amended employment tax returns, the situation is even worse – there were over 500 open DOMA claims in SB/SE Employment Tax Field and Campus Compliance Services groups as of May 27, 2014, most of which were filed during the 2009 tax year.²⁰ The delays in resolving these claims may impose a significant burden on affected taxpayers.²¹ The National Taxpayer Advocate is concerned about the delay in processing these protective claims and urges the IRS to promptly resolve the remaining claims. In fiscal year (FY) 2015, TAS will monitor the status of the remaining open claims and, when working TAS cases that involve DOMA claims, will seek expedited treatment in appropriate cases.

14 See Notice 2013-61, 2013-44 I.R.B. 432 (setting forth guidance for employers and employees to make refund claims or adjustments of payroll tax withholding for some benefits provided and monies paid to same-sex spouses); IRS, *Answers to Frequently Asked Questions for Individuals of the Same Sex Who Are Married Under State Law*, available at <http://www.irs.gov/uac/Answers-to-Frequently-Asked-Questions-for-Same-Sex-Married-Couples> (last visited Mar. 26, 2014). See also IRC §§ 105 and 106.

15 Servicewide Electronic Research Program (SERP) Alert No. 13A0447 (Jul. 24, 2013) ("If assigned a Form 1040X Amended return and "Defense of Marriage Act", "DOMA", "*Windsor v. the United States*", or a reference pertaining to "*Recent Supreme Court Decision*" is notated on the claim, HOLD the claim.") (Emphasis added).

16 See IRS response to TAS information request (Oct. 29 & Nov. 1, 2013). The IRS estimated about 200 claims in Field Exam, approximately ten in Estate and Gift Tax, 188 individual taxpayer claims, and 566 employer claims in Employment Tax (including Accounts Management). The IRS could not quantify any claims being on hold at campuses, stating that campuses do not track DOMA-related cases.

17 W&I response to TAS information request (June 16, 2014); SB/SE response to TAS information request (June 19, 2014).

18 SB/SE response to TAS information request (June 19, 2014).

19 *Id.*

20 *Id.*

21 However, the IRS did not commit to promptly process the DOMA returns and related claims or to review identity theft and revenue protection filters in light of common filing scenarios by same-sex spouses to ensure that the IRS does not freeze and delay refunds to legitimately married taxpayers. See IRS responses to the 2013 Annual Report to Congress recommendations, available at <http://www.taxpayeradvocate.irs.gov/userfiles/file/IRS-2013-MSP-Responses.pdf>.

Assuming that following the post-*Windsor* guidance, same-sex individuals and couples are filing legitimate original and amended returns, the National Taxpayer Advocate remains concerned that the IRS automatic sorting criteria, identity theft or revenue protection filters may put certain returns in the limbo of refund fraud processes. In FY 2015, TAS will also review identity theft and revenue protection filters in light of common filing scenarios by same-sex spouses to ensure that the IRS does not freeze and delay refunds to legitimately married taxpayers. TAS will offer its perspective in training IRS employees to recognize the many and diverse scenarios that can arise as tax administration transitions to recognizing same-sex marriages.

Ongoing TAS Advocacy Efforts

Since the issuance of Revenue Ruling 2013-17, same-sex couples encountered various obstacles to amending tax returns for open years and to resolving account issues. For the period from October 1, 2013 to March 31, 2014, TAS identified 39 cases with DOMA related issues.²² Of the 39 cases, 29 cases involved taxpayers seeking TAS assistance in filing amended returns for changing filing statuses, of which six had filed protective claims. The remaining cases involved the following issues:

- The exclusion from gross income of the value of employer-provided health coverage to the employee's same-sex spouse and dependents;
- Audit reconsiderations for previously denied dependent exemptions for step-children belonging to the same-sex spouse, denied Earned Income Tax Credit (EITC), and denied Additional Child Tax Credit (ACTC) for pre-*Windsor* filings;
- Community property issues; and
- Processing of "protective" claims for prior taxable years.

Comprehensive Training and Outreach to TAS Employees on Same-Sex Marriage Issues

TAS's own efforts to educate its employees about the impact of DOMA began with an article in TAS's weekly newsletter to all TAS employees explaining new IRS guidance and return filing issues associated with same-sex marriages.²³ In April 2014, TAS developed training regarding the legal history of same-sex marriages, IRS guidance on tax treatment as well as processing and other issues when changing marital status, and advocacy opportunities. The training was recorded and provided to all TAS case advocacy employees, and will be updated to address future developments.²⁴

²² Taxpayer Advocate Management Information System (TAMIS) history analysis (June 2, 2014).

²³ TAS Wednesday Weekly, *Key Points About Repeal of Defense of Marriage Act* (Mar. 12, 2014).

²⁴ TAS announced the training video in a Special Edition all-employee newsletter on April 25, 2014, providing the May 30, 2014 due date for completion. TAS issued a reminder to take the training on May 14, 2014.

This training alerts employees of potential issues that might arise in working cases and the need to elevate those issues to management and in SAMS to assist TAS in identifying any trends or other systemic issues. The training emphasizes the following general principles to consider while advocating for same-sex individuals:

- Same-sex issues involving joint or married separate filing issues should be the same as opposite-sex couples filing with the same issues.
- The selection criteria for examination should be the same regardless of the taxpayer's gender.
- Same-sex couples should not have to produce any additional documentation, come under increased scrutiny, or wait longer than opposite sex couples with similar issues. The gender of the taxpayer should not be a factor.
- Local Taxpayer Advocates should consider using a Taxpayer Assistance Order (TAO) where same sex couples are being treated differently than opposite sex couples.

Ongoing Efforts with the IRS

TAS continues to participate in regular briefings with senior IRS officials and holds bi-weekly internal technical issues calls. Additionally, TAS is reviewing all draft IRM and other IRS guidance to identify potential same-sex marriage issues. Where same-sex partners marry in a state that recognizes same-sex marriage but reside and own property in a state that does not recognize the union, issues pertaining to collection of balances due could arise. Although for federal purposes, the couple is jointly and severally liable, when the IRS goes to collect, it determines the taxpayer's property interest under state law. Thus, if the taxpayers own property in a state that does not recognize their marriage, there may be complex real property issues that the IRS will need to consider when deciding how to collect the tax debt.

TAS will monitor issues related to the collection of the tax and will elevate any problems to the IRS. TAS will continue soliciting comments and observations from taxpayers, TAS and IRS employees, and external stakeholders on potential systemic issues, delays, and situations of disparate treatment for same-sex taxpayers in processing of returns, claims, and examinations that may need to be raised in National Taxpayer Advocate Annual Reports to Congress.